Supreme Court, U.S.
FILED

No. 97-1604 MAR 30 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

KNIGHTS OF THE KU KLUX KLAN and
DAVID A. NEUMANN,
Petitioners,

v.

MAYOR OF LANSING and CITY OF LANSING,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

GRANZOTTO & NICITA, P.C.
MARK GRANZOTTO
COUNSEL OF RECORD

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN

1500 BUHL BUILDING
DETROIT, MICHIGAN 48226
(313) 964-4720
ATTORNEYS FOR PETITIONERS

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

52 pp

QUESTION PRESENTED FOR REVIEW

Where a state actor seeks and successfully obtains a court order which has the effect of violating a person's constitutional rights, is the state actor's conduct a proximate cause of the constitutional violation for purposes of a cause of action under 42 U.S.C. § 1983, or is the sole cause of that violation the intervening court order?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THE MICHIGAN COURT OF APPEALS' DETERMINATION THAT RESPONDENTS' CONDUCT WAS NOT A PROXIMATE CAUSE OF THE DENIAL OF PETITIONER'S FIRST AMENDMENT RIGHTS REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND IS IN CONFLICT WITH NUMEROUS REPORTED FEDERAL DECISIONS ON THIS SUBJECT. 9

CONCLUSION 17

APPENDIX

Appendix A
Michigan Supreme Court Order 1a

Appendix B
Michigan Court of Appeals Decision 3a

Appendix C
Ingham County Circuit Court's Decision 19a

Appendix D
Michigan Court of Appeals Order 26a

TABLE OF AUTHORITIES

Cases **Page**

Buenrostro v. Collazo,
973 F.2d 39 (1st Cir. 1992) 14

Conner v. Reinhard,
847 F.2d 384 (8th Cir. 1988) 11

DeLoach v. Beavers,
922 F.2d 618 (10th Cir. 1990) 14

Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, International Typographical Union,
471 F.2d 872 (6th Cir. 1972) 6

Goodwin v. Metts,
885 F.2d 157 (4th Cir. 1989) 14

Johnson v. City of Chicago,
711 F. Supp. 1465 (N.D. Ill. 1989) 14

Jones v. City of Chicago,
856 F.2d 985 (7th Cir 1988) 14

Malley v. Briggs,
475 U.S. 335 (1986) 11-14

Mayor of the City of Lansing v. Knights of the Ku Klux Klan (After Remand),
222 Mich. App. 637; 564 N.W.2d 177 (1997) . 1, 6

Mayor of the City of Lansing v. Knights of the Ku Klux Klan,
456 Mich. 915; __ N.W.2d __(1997) 1

Merritt v. Mackey,
827 F.2d 1368 (9th Cir. 1987) 11

Mitchell v. City of Hartford,
674 F. Supp. 60 (D. Conn. 1986) 14

Monroe v. Pape,
365 U.S. 167 (1961) 12, 13

Reich v. Minnicus,
886 F. Supp. 674 (S.D. Ind. 1993) 14

Robinson v. Maruffi,
895 F.2d 649 (10th Cir. 1990) 14

Springer v. Seamen,
821 F.2d 871 (1st Cir. 1987) 11

Waddell v. Forney,
108 F.3d 889 (8th Cir. 1997). 11

Wagenmann v. Adams,
829 F. 2d 196 (1st Cir. 1987) 14

Wyatt v. Cole,
504 U.S. 158 (1992) 13

Statutes

28 U.S.C. §1257(a) 1

29 U.S.C. §185, *et. seq.* 7

42 U.S.C. § 1983 . . . . . passium

Treatises

Restatement (Second) Torts 15

W. Keeton, Prosser and Keeton,
on the Law of Torts (5th ed. 1984) 15

OPINIONS BELOW

The December 30, 1997, Order of the Michigan Supreme Court denying Petitioners' request for leave to appeal is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 456 Mich. 915; __ N.W.2d __(1997). That order is reproduced in the attached Appendix beginning at page 1a.

The April 4, 1997 opinion of the Michigan Court of Appeals is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan (After Remand)*, 222 Mich. App. 637; 564 N.W.2d 177 (1997). That opinion is reproduced in the attached Appendix beginning at page 3a.

The June 20, 1995, opinion of the Ingham County Circuit Court is not officially reported. That opinion is reproduced in the attached Appendix beginning at page 19a.

JURISDICTION

The Michigan Court of Appeals' decision was issued on April 4, 1997. Petitioners filed an Application for Leave to Appeal in the Michigan Supreme Court seeking discretionary review. That application was denied in an Order dated December 30, 1997 (App. 1a). This Court's jurisdiction is being invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED IN THIS CASE

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 6, 1994, the Knights of the Ku Klux Klan (KKK) applied for permission to conduct a rally on the grounds of Michigan's State Capitol on July 23, 1994. The KKK filed the appropriate request with the Michigan Capitol Committee, the committee created by Michigan law which is charged with the responsibility of overseeing the capitol grounds. The request was approved by the Executive Director of the Michigan Capitol Committee in early June. Following that approval, the KKK and its Michigan coordinator, David Neumann, began making plans for the scheduled rally.

On July 8, 1994, the City of Lansing and David Hollister, the mayor of the City of Lansing, filed a cause of action in the Ingham County Circuit Court against the KKK, Mr. Neumann and several other individuals. In their Complaint, the City of Lansing and Mr. Hollister (hereinafter: "Respondents") sought an injunction "prohibiting and restraining the Defendants, their employees, agents, members and those in active concert with them from conducting, or allowing to be conducted, a Klan rally . . . on the State Capitol Grounds on July 23, 1994, or any other date . . ."

On July 18, 1994, the KKK and Mr. Neumann (hereinafter: "Petitioners") filed their Answer to the Complaint. Petitioners also filed a counterclaim in which they asserted that Respondents, by initiating and prosecuting their injunction action, were "seeking to restrain the exercise of [Petitioners'] state and federal constitutional rights to free speech, association, assembly and petition." The Petitioners' counterclaim contained a request for declaratory relief and damages under both the Michigan Constitution and the federal civil rights act, 42 U.S.C. §1983.

A hearing on the Respondents' Motion for Preliminary Injunction was held in the Ingham County Circuit Court on July 19, 1994, four days before the rally was scheduled to take place. At that hearing, Respondents presented three witnesses, Mr. Hollister and two members of the city's police force. These three witnesses testified concerning an earlier KKK rally at the state capitol conducted in April 1994. During that rally counter-demonstrators attempted to disrupt the KKK's activities. All three witnesses who testified at the preliminary injunction hearing acknowledged that the KKK participants in the April 1994 rally had been lawful and non-violent. However, three counter-demonstrators were arrested and there were three minor injuries caused by the actions of the counter-demonstrators. Respondents' witnesses also testified that they feared that there might be similar violence directed against the KKK by counter-demonstrators at the rally planned for July 23, 1994. On the basis of this fear of violence from counter-demonstrators, Respondents requested an injunction prohibiting Petitioners from conducting their rally at the state capitol.

At the end of the July 19, 1994, hearing, the circuit judge orally announced that he would grant the request for a preliminary injunction:

> The testimony in this case compels me to conclude that the city cannot adequately police or prevent crowd violence with the personnel available at the state capitol this coming Saturday. Therefore, I will grant the injunction prayed for by the city.

Two days later the circuit judge signed an injunction. That injunction specified that the Petitioners and their agents:

> [B]e and hereby are restrained and enjoined from conducting, or allowing to be conducted, or holding, or allowing to be held, a Knights of the Ku Klux Klan or Knights of the Ku Klux Klan/Michigan Realm rally or rallies on the State of Michigan Capitol Grounds in Lansing, Michigan until further Order of this Court, and that said preliminary injunction will be effective from this date.

Petitioners abided by the terms of the circuit court's preliminary injunction; they did not hold the rally which they had planned for the state capitol on July 23, 1994.

Petitioners, however, challenged the circuit court's injunctive decree in the Michigan Court of Appeals, filing an emergency appeal in that court. On August 2, 1994, a panel of that Court issued an Order summarily reversing the circuit court's preliminary injunction. (App. 26a). The Michigan Court of Appeals held that the circuit court's injunction infringed on Petitioners' "exercise of [their] First Amendment rights in a quintessentially public forum. . ." *Id.* After concluding that the circuit court's injunction violated the Petitioners' First Amendment rights, the Michigan Court of Appeals remanded the case to the circuit court for further proceedings.

Respondents did not appeal the Court of Appeals' determination that the injunction violated Petitioners' First Amendment rights to the Michigan Supreme Court.

Following remand to the circuit court, Petitioners filed a motion for partial summary judgment on the issues raised in their counterclaim. In that motion, Petitioners asserted that, because the Court of Appeals had ruled in its August 2, 1994,

decision that the injunction obtained by Respondents had violated Petitioners' First Amendment rights, they were entitled to judgment with respect to the liability aspects of their §1983 claim.

Respondents filed a response to the Petitioners' motion for partial summary judgment. In addition, Respondents filed their own motion for summary disposition, requesting that all of the claims stated in the Petitioners' counterclaim be dismissed.

Following briefing and oral argument on the motions, the circuit court issued a written Opinion and Order on June 20, 1995, granting Respondents' motion for summary judgment (App. 19a).

Petitioners appealed the circuit court's decision dismissing their §1983 and state constitutional claims to the Michigan Court of Appeals. The briefs which the parties submitted to that court were primarily addressed to law of the case principles; Petitioners argued that the circuit court's decision granting judgment as a matter of law to Respondents was in conflict with the Michigan Court of Appeals' August 2, 1994, Order which found that the injunction violated Petitioners' rights under the Untied States Constitution. During oral argument in the Michigan Court of Appeals one of the three judges assigned to the case raised the additional question of whether Respondents' conduct could be considered a proximate cause of Petitioners' injury or whether the source of that injury was solely the circuit court's issuance of an injunction.

On April 4, 1997, the Michigan Court of Appeals issued its decision in this case. *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 222 Mich. App. 637; 564

N.W.2d 177 (1997). In that opinion, the court addressed only a single issue - whether the Respondents' actions in seeking and successfully obtaining an injunction barring Petitioners' rally constituted a proximate cause of the Petitioners' constitutional injury. In addressing this question, the Michigan Court of Appeals acknowledged that, based on its August 2, 1994 decision, there was no question that, "the harm to defendants . . . was caused by a constitutional violation." (App. 7a). Yet, despite concluding that Petitioners' constitutional rights had been violated, the Michigan Court of Appeals held that summary judgment was appropriate with respect to their §1983 claim because the Respondents' conduct did not cause the violation of Petitioners' constitutional rights.

The Michigan Court of Appeals held, instead, that the "direct 'cause' of the constitutional violation here was the court's issuance of the overbroad injunction, not plaintiff's pursuit thereof." (App. 10a). And, drawing upon a single federal precedent, *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, International Typographical Union*, 471 F.2d 872 (6th Cir. 1972), a case which arose in the context of the Labor Management Relations Act, 29 U.S.C. §185, *et. seq.*, the Michigan Court of Appeals adopted the following "general rule" of causation in cases filed under 42 U.S.C. §1983:

> . . . under the general rule, the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for the purpose of §1983 because any erroneous issuance of an injunction is the act of the *court*.
>
> (App. 10-11a.)

(emphasis in original.)

Because, in its view, the violation of Petitioners' First Amendment rights was "directly" caused by the circuit court's injunction, not the conduct of the Respondents, the Michigan Court of Appeals held that summary judgment was appropriate on Petitioners' §1983 claim.

Petitioners sought leave to appeal the dismissal of their §1983 claims in the Michigan Supreme Court. On January 30, 1997, the Michigan Supreme Court issued an Order denying Petitioners' application. (App. 1a).

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN COURT OF APPEALS' DETERMINATION THAT RESPONDENTS' CONDUCT WAS NOT A PROXIMATE CAUSE OF THE VIOLATION OF PETITIONERS' FIRST AMENDMENT RIGHTS IS ERRONEOUS AND IN CONFLICT WITH NUMEROUS REPORTED FEDERAL DECISIONS ON THIS SUBJECT.

This case raises an important question related to the issue of causation in §1983 litigation. The Michigan Court of Appeals held herein that Respondents, who sought and obtained a court order which had the effect of violating Petitioners' First Amendment rights, could not be held liable for their conduct under §1983 because that conduct was not a cause of Petitioners' constitutional injury. In arriving at this conclusion, the Michigan Court of Appeals has seriously misapplied federal law bearing on the essential element of causation in a §1983 claim.

In reaching its decision the Michigan Court of Appeals drew a sharp line between the conduct of the Respondents, in seeking and successfully obtaining an injunction, and the circuit court's order granting Respondents the relief which they had requested. In the view of the Michigan Court of Appeals, it was the circuit court's order which represented the "direct" cause of Petitioners' injuries, not the actions of Respondents in seeking that order.

The analysis employed by the Michigan Court of Appeals is suspect for a number of reasons. Its resolution of the causation question presented herein is in direct conflict

with the express wording of §1983 and irreconcilable with a number of decisions of this Court and the federal appellate courts.

The Michigan Court of Appeals ruled herein that Respondents did not "directly" deprive the Petitioners of their constitutional rights. In the Michigan Court of Appeals' view, the individual who subjected Petitioners to a violation of their rights was the circuit judge who issued the injunction, not the Respondents.

Yet, even if this were an accurate portrayal of what occurred in this case, this analysis fails to take into account the express wording of §1983. That statute provides for a cause of action against any person who, acting under color of law, "subjects or *causes to be subjected*" any person to a violation of federal constitutional rights. Thus, under the text of §1983, Respondents are not merely liable for their conduct which *directly* subjects an individual to a violation of constitutional rights; they are also liable for any conduct which *causes an individual to be subjected* to a violation of such rights.

§1983's causation language has been addressed in a number of federal appellate decisions. In these cases the federal courts have focused on the "subjects or causes to be subjected" phrase within §1983 and have drawn the following conclusion:

> "The requisite causal connection [between the government conduct and the deprivation] can be established not only by some kind of direct personal participation in the deprivation *but also by setting in motion a series of acts by others which the actor knows or reasonably*

> *should know would cause others to inflict the constitutional injury.*"
>
> *Waddell v. Forney,* 108 F.3d 889, 894 (8th Cir. 1997). (emphasis added).

The conclusions reached by the Eighth Circuit in *Waddell* have been repeated in other federal circuits. See *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988); *Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987); *Springer v. Seamen*, 821 F.2d 871, 879 (1st Cir. 1987).

As these decisions indicate, the text of §1983 anticipates that claims may be made not only against those state actors whose conduct "directly" infringes on federally protected rights, but also against those who "set[] in motion a series of acts by others", which the state actor knows or reasonably should have known would result in injury.

That is precisely what occurred in this case. By seeking and successfully obtaining an injunction Respondents caused Petitioners to be subjected to a violation of First Amendment rights. That is sufficient for liability under §1983.

The Michigan Court of Appeals' analysis in this case is not only in conflict with the text of §1983, it is also contrary to a wealth of federal court precedent which has construed the causation question in litigation under the civil rights statute.

This Court had occasion to consider the causation element in a §1983 action in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, a police officer applied for an arrest warrant by asserting that Mr. Briggs was guilty of drug

possession. This warrant was later signed by a judge and formed the basis for Mr. Briggs' arrest. The criminal charges lodged against Mr. Briggs were subsequently dismissed, and he instituted a cause of action under §1983 against the police officer who applied for the warrant, asserting that the arrest violated his Fourth Amendment rights.

One of the defenses offered by the defendant in *Malley* was based on proximate cause. The defendant argued that the judge's signing of the arrest warrant operated to break the causal relationship between his own conduct and the deprivation of Mr. Briggs' constitutional rights.

In *Malley*, this Court considered the scope of the immunity which the defendant possessed under these circumstances. However, in the course of its opinion the Court also addressed the defendant's causation argument and emphatically rejected it:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the district Court's "no causation" rationale in this case is inconsistent with our interpretation of §1983. As we stated in *Monroe v. Pape*, 375 U.S. 167, 187 (1961), §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing

the same causal link.

> *Malley*, 475 U.S. at 344, n. 7
> (emphasis added).

As noted in *Malley*, this Court confirmed in *Monroe v Pape, supra*, that a §1983 claim must be read in conjunction with the general tort principle that "makes a man responsible for the natural consequences of his actions." In this case, Respondents requested an injunction to prohibit Petitioners from conducting a rally at the state capitol. Ultimately, Respondents were awarded the injunction which they sought. Where, as here, a party files a case in which it seeks a particular injunctive decree and an injunction is ultimately issued in precisely the form requested, that injunction is the "natural consequence" of the actions of the party which sought its issuance. Thus, under *Monroe v. Pape* and *Malley*, the Michigan Court of Appeals erred in concluding that Respondents' conduct was not a proximate cause of Petitioners' injury.

Like the police officer in *Malley*, Respondents herein requested that a judicial officer enter an order which had the effect of violating a party's constitutional rights. Respondents, like the police officer in *Malley*, cannot immunize themselves from liability for initiating this process by suggesting that a subsequent judicial order, which they requested, severs the causal chain.

The *Malley* holding was more recently reaffirmed in *Wyatt v. Cole,* 504 U.S. 158 (1992), where the Court, citing *Malley*, indicated that a §1983 cause of action would "extend to complaining witnesses who . . . set the wheels of government in motion by instigating a legal action." 504 U.S. 164-165. Again, that is precisely what Respondents

have done in the instant case. They instituted a court case which was designed to prevent the Petitioners from exercising their First Amendment right to conduct a rally at the state capitol. The fact that Respondents succeeded in obtaining the court order which they sought and a judge issued an injunction does not mean that the causal relationship between their conduct and the Petitioners' injuries was somehow broken.

Following the lead of *Malley*, federal courts have routinely rejected the argument that a §1983 claim fails on proximate cause grounds because intervening judicial conduct severs the causal link between a state actor's conduct and the violation of an individual's constitutional rights. See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 993-994 (7th Cir 1988); *Robinson v. Maruffi*, 895 F.2d 649, 656 (10th Cir. 1990); *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992); *DeLoach v. Beavers*, 922 F.2d 618, 621-622 (10th Cir. 1990); *Goodwin v. Metts*, 885 F.2d 157, 161-162 (4th Cir. 1989); *Wagenmann v. Adams,* 829 F.2d 196, 212-213 (1st Cir. 1987); *Reich v. Minnicus*, 886 F. Supp. 674, 684-685 (S.D. Ind. 1993); *Johnson v. City of Chicago*, 711 F. Supp. 1465, 1473-1474 (N.D. Ill. 1989); *Mitchell v. City of Hartford*, 674 F. Supp. 60, 64-65, (D. Conn. 1986).

The holdings reached by the courts in these cases are not particularly surprising in light of the fact that it is universally recognized that common law tort principles are applicable to §1983 cases. See *Malley*, 475 U.S. at 344, n. 7; *Monroe v. Pape, supra* (1961); *cf. Carey v. Piphus*, 435 U.S. 247, 257-258 (1978); 42 U.S.C. §1988. And under fundamental common law tort principles, Respondents cannot sustain a claim that the circuit court's decision granting an injunction constitutes *the* cause or a superseding cause of the Respondents' injuries, thereby severing the causal

relationship.

The common law of torts recognizes, for example, that these may be more than one proximate cause of a particular injury. Restatement (Second) of Torts, §430 and Comment d. Thus, a party whose conduct represents a factor in bringing about an injury "will not be absolved from libility merely because other causes have contributed to the result . . ." W. Keeton, Prosser and Keeton on the Law of Torts, p. 268 (5th ed. 1984).

It is also a basic notion of the common law of torts that an intervening force will constitute a superseding cause, thereby breaking the causal chain between the torfeasor's conduct and the plaintiff's injury, only where that intervening force is not reasonably foreseeable. Keeton, *supra*, §44, pp. 303-306. cf. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996). Thus, the conduct of a third person will not be deemed a superseding cause under common law principles if that conduct was foreseeable at the time of the original tortious acts. Moreover, under basic common law principles, intervening conduct which is negligent or even intentional in character may be reasonably foreseeable. *See* Keeton, *supra*, pp. 304-305; Restatement (Second) of Torts, §§447-448.

Under these basic common law principles, the Michigan Court of Appeals' determination that the actions of Respondents were not a proximate cause of Petitioners' constitutional injuries cannot be sustained.

It is, of course, true that once Petitioners secured the appropriate permit to conduct their rally at the state capitol, Respondents could not by themselves stop that rally from taking place; they needed a court order to prevent it. In that obvious sense another force was necessary to prevent

Petitioners from exercising their First Amendment rights. It is, however, equally obvious that the circuit court could not have taken the steps to prevent Petitioners' rally on its own. To issue the injunction the circuit court had to be presented with a case over which it could exercise jurisdiction.

This case, therefore, presents a situation which is routinely found in the common law of torts - two forces must, of necessity, coalesce to bring about a particular injurious result. However, under basic common law principles in these circumstances both of these forces will be considered a proximate cause of any injury that results. Thus, based on fundamental common law principles, Respondents could not escape liability simply because their conduct was not the "direct" cause of the injury.

Similarly, under basic common law principles Respondents could not assert that the circuit court's order represented a superseding cause of Petitioners' injuries. It is impossible to suggest that the issuance of the circuit court's injunction was not foreseeable from Respondents' perspective when that order was specifically requested by the Respondents.

The Michigan Court of Appeal's resolution of the causation element of Petitioners' §1983 claim was erroneous for all of the reasons stated above. Based on either the express language of §1983, this Court's decision in *Malley* or fundamental common law principles which are incorporated into §1983, Respondents' successful effort to obtain an injunction which violated Petitioners' First Amendment rights constituted a proximate cause of the injuries which resulted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/_____
GRANZOTTO & NICITA, P.C.
MARK GRANZOTTO
Counsel of Record

MICHAEL J. STEINBERG
American Civil Liberties Union
Fund of Michigan

1500 Buhl Building
Detroit, Michigan 48226
(313) 964-4720

Dated: March 25, 1998

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: December 30, 1997

MAYOR OF LANSING and CITY OF LANSING,

Plaintiffs/Counter-Defendants-Appellees,

v

SC: 109240
COA: 187765
LC: 94-007936-AZ

KNIGHTS OF THE KU KLUX KLAN and DAVID A. NEUMANN,

Defendants/Counter-Plaintiffs-Appellants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

MAYOR OF LANSING
and CITY OF LANSING,

Plaintiffs/Counterdefendants-Appellees,

FOR PUBLICATION
April 4, 1997
9:45 a.m.

v.

No. 187765
Ingham Circuit Court
LC No. 94-077936-AZ

KNIGHTS OF THE KU KLUX KLAN
and DAVID A. NEUMANN,

Defendants/Counterplaintiffs-Appellants.

Before: O'Connell, P.J., Markman and M. J. Talbot, JJ.

MARKMAN, J.

Defendants, the Knights of the Ku Klux Klan and David A. Neumann, appeal as of right from an order granting summary disposition for plaintiffs, the mayor of the City of Lansing and the City of Lansing, with regard to defendants' countersuit, which sought damages pursuant to 42 USC 1983 and for malicious prosecution. We affirm.

On July 8, 1994, following the issuance of a state permit for a Klan rally to be held on the grounds of the Capitol building on July 23, 1994, plaintiffs filed a complaint for injunctive relief, asking the circuit court to order that the rally be held at an alternate site in light of various public safety concerns. Defendants counterclaimed, alleging that plaintiffs' initiation of the suit constituted an unconstitutional prior restraint on defendants' First Amendment rights, in violation of 42 USC 1983 and the Michigan Constitution, and that the suit constituted malicious prosecution.

Plaintiffs' suit was prompted by the events attending defendants' previous rally on the Capitol grounds on April 23, 1994. Despite the presence of approximately 500 uniformed state and city police officers and total expenditures of $147,000 in public funds (including $47,000 by the City of Lansing), the April rally triggered occurrences of public disorder and violence. The mayor testified that "the crowd got out of control," "police security was breached," and that the police "lost control" and a police officer testified that "there came a point in time where basically we had no control of the crowd." On the basis of this history, the mayor asked defendants to change the location of the rally to a nearby city park --a more defensible but also a more remote location in terms of the potential audience for defendants' message. Defendants rejected the offer. Plaintiffs then filed a complaint seeking injunctive relief, claiming that they would be unable to provide adequate police protection for the second rally as

planned. The Ingham Circuit Court granted a preliminary injunction prohibiting the demonstration from being conducted on the Capitol grounds.

On appeal by defendants, a panel of this Court peremptorily reversed the circuit court's decision in an order that stated in relevant part:

> Based upon the facts presented to this Court in the briefs of the parties and in the complaint and affidavits of plaintiff, the circuit's court's July 21, 1994 preliminary injunction represents an abuse of discretion. The facts of this case do not justify enjoining defendant's exercise of its First Amendment rights in a quintessentially public forum, and we find that the preliminary injunction was not narrowly drawn to achieve a compelling state interest. *Madsen v Women's Health Center, Inc,* [512 US 573; 114 S Ct 2516; 129 L Ed 2d 593 (1994)]; *Forsyth County v The Nationalist Movement*, 505 US [123]; 112 S Ct [2395]; 120 L Ed 2d 101 (1992); *Frisby v Schultz,* 487 US 474; 108 S Ct 2495; 101 L Ed 2d 420 (1988); *Boos v Barry,* 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988); *Perry Education Ass'n v Perry Local Educat[ors'] Ass'n,* 460 US 37; 103 S Ct 948; 74 L Ed 2d 794 *(1983); Christian Knights of the Ku Klux Klan [Invisible Empire, Inc.] v District of Columbia,* [297 US App DC 312]; 972 F2d 365 (1992). Insulting and even outrageous speech must be tolerated in order to protect First Amendment freedoms. *Boos v Barry, supra, 485* US at 322. The grounds of the State Capitol are both

> symbolic and directly relevant to defendant's intended message. The threat of violence relied upon by plaintiff is insufficient to prohibit entirely defendant's speech in the public forum chosen by defendant. [*Mayor of Lansing v Knights of the Ku Klux Klan,* unpublished order of the Court of Appeals, entered August 2, 1994 (Docket No. 177118)].

Based on conflicting interpretations of the scope and effect of our interlocutory decision, the parties then brought cross motions for summary disposition in the trial court. Defendants claimed that this Court's decision overturning the preliminary injunction rendered plaintiffs' case moot and that defendants were entitled to partial summary disposition with respect to their §1983 claim and to compensatory and punitive damages. Plaintiffs claimed that they were entitled to summary disposition with respect to the § 1983 claim because their request for injunctive relief had not been arbitrary or capricious and had sought only to impose a permissible restriction on the place the rally was to be held. Following oral argument, the trial court issued a written opinion and order granting plaintiffs' motion for summary disposition with regard to defendants' counterclaims, apparently pursuant to MCR 2.116(C)(10). The court concluded that plaintffs could not be held liable under 42 USC 1983 for seeking an overly broad injunction and that defendants' malicious prosecution claim failed because they had not demonstrated that plaintiffs' suit lacked probable cause.

The only issue before us is the appropriateness of the trial court's grant of summary disposition in favor of plaintiffs with respect to on the § 1983 counterclaim, because defendants do not challenge the dismissal of their malicious prosecution theory on appeal. This Court reviews decisions

regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing),* 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

42 USC 1983 provides that a person, including a public officer, acting under color of law who:

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Proper analysis of a § 1983 claim against a municipality requires examination of two issues. "(1) whether plaintiff s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v Harker Heights,* 503 US 115, 120; 112 S Ct 1061; 117 L Ed 2d 261 (1992). Here, we assume that the harm to defendants --which consists of a time-shifting of the planned rally due to judicial adjudication of the First Amendment issues-- was caused by a constitutional violation, because this Court reversed the preliminary injunction on First Amendment

grounds.[1] The issue before us, therefore, becomes whether plaintiffs' action of seeking an injunction to limit the location of the rally "caused" the constitutional violation.

Here, plaintiffs' actions consisted exclusively of availing themselves of the legal process to try to limit the location of defendants' rally. The United States Supreme

---

[1] We note that consideration of a threshold issue might have obviated the necessity of reaching the constitutional questions. Defendants obtained their permit from the Michigan Capitol Park Commission, which has authority to promulgate rules pursuant to the Administrative Procedure Act of 1969, MCL 24.201, *et seq*; MSA 3.560(101, *et seq*, for the management and operation of the State Capitol and its grounds, MCL 18.1298c(b); MSA 3.516(298c)(b), The Commission consists of seven members, one of whom is a nominee of the mayor of the City of Lansing, MCL 18.1298(2); MSA 3.516(298)(2). The commission conducts its business subject to the Open Meetings Act and must give public notice of the time, date, and place of its meetings. MCL 18.1298a(l); MSA 3.516(298a)(1). Hence, we assume plaintffs had constructive, if not actual, notice that defendants' application for a rally permit would be up for consideration by the commission before the actual approval of the permit and, likewise, had notice of the issuance of the permit. Accordingly, plaintiffs had an opportunity to argue their justification and evidentiary support for time, place, and manner restrictions to the commission. In lieu of seeking injunctive relief, they could have pursued remedies pursuant to MCL 600.631; MSA 27A.631 (RJA §631) *1). Southeastern Oakland Co Incinerator Authority v Dep't of Natural Resources,* 176 Mich App 434; 440 NW2d 649 (1989). The present suit for injunctive relief was vulnerable to a motion to dismiss for plaintiffs' failure to exhaust its remedies under RJA §631. *Blue Cross & Blue Shield of Michigan v Comm'r of Insurance,* 155 Mich App 723, 729-734; 400 NW2d 638 (1986).

Court has recognized the validity under the First Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. See *Madsen, supra.*[2] Here, plaintiffs, having some reason to anticipate violence, attempted to strike at it preemptively by pursuing an injunction to limit the place of the planned rally to a more easily defended location. Plaintiffs presented a colorable claim that their proposed injunction constituted an appropriate time, place, or manner restriction on defendants' First Amendment rights and sought a court ruling with respect to the issue.[3]

---

[2] The United States Supreme Court has recognized the power of the police to limit or curtail speech when there is a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order." *Feiner v New* York, 340 US 315, 320; 71 S Ct 303; 95 L Ed 295 (1951), quoting *Cantwell v Connecticut,* 310 US 296, 308; 60 S Ct 900; 84 L Ed 1213 (1940); see also *Cohen v California,* 403 US 15, 20; 91 S Ct 1780; 29 L Ed 2d 284 (1971) Recognizing that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker" and "mindful" of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings," the *Feiner* Court nevertheless held that when a situation threatens to turn into civil disorder, the authorities are not "powerless to prevent a breach of the peace." *Feiner, supra,* at 320-321. See also *Schenk v United States,* 249 US 47, 52; 39 S Ct 247; 63 L Ed 470 (1919),

[3] Any error on plaintiffs' part was exclusively in its application of the law to the situation at issue. Such legal errors do not generally subject a party to tort liability. For example, we note that Michigan does not recognize a separate civil action for perjury, *Meyer v Hubbell,* 117 Mich App 699, 704; 324 NW2d 139 (1982);

The direct "cause" of the constitutional violation here was the court's issuance of the overbroad injunction, not plaintiffs' pursuit thereof. If the court had denied the injunction, there would have been no constitutional violation. However, defendants argue that plaintiffs "caused" the constitutional violation because the court would not have issued the overbroad injunction unless plaintiffs had requested it. In other words, "but for" plaintiffs' lawsuit, the court would not have been prompted into taking its action.

Under federal law, the general rule is that if an injunction issues erroneously, any resulting irreparable injury is not redressable because the error was an act of the court, not of the party who sought the injunction. *Detroit Newspaper Puhlishers Assn v Detroit Typographical Union No.18, Int'l Typographical Union,* 471 F2d 872, 876 (CA 6, 1972). Similarly, in Michigan, at common law the general rule is that there is no tort liability for wrongfully suing out an injunction. *In re Pritchard Estate,* 169 Mich App 140, 149; 425 NW2d 744 (1988). Federal and state court rules provide exceptions to this general rule.[4] Nevertheless, under

---

a fortiori, a litigant would not be liable for damages for making a non-perjurious, plausible legal argument. Further, in the absence of frivolousness, a losing party is not even liable for the other party's attorney fees, much less tort damages, for seeking recovery to which it is ultimately found unentitled. See MCR 2.625(A)(2), MCL 600.2591; MSA 27A.2591, *State Farm Automobile Ins Co v Allen,* 50 Mich App 71, 74-80; 212 NW2d 821 (1973).

[4] For example, with respect to the issuance of a preliminary injunction or temporary restraining order, FRCivP 65(c) and MCR 3.310(D)(1) provide for security, *in the amount the court deems proper,* for the payment of damages that "may be

the general rule, the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for purposes of § 1983 because any erroneous issuance of an injunction is the act of the *court*.

More generally, the processes of the *law*, can be said to have caused any constitutional violation resulting from an injunction. Here, the circuit court sought to interpret §1983, the First Amendment, and the law concerning injunctions. The circuit court did nothing more than give voice to this law. That, in view of this Court, it ultimately erred in its interpretation does not alter the fact that it was the operation of the *law* itself that caused any resulting harm to defendants. Our legal system fully contemplates that courts will sometimes act in error and that such error win need to be corrected through an appellate process. Const 1963, art 6, §§l, 8, and 13. That such appellate process must be invoked before an error can be corrected does not mitigate the fact that it is the law itself that is working its effect upon the parties, not the will of the individual judge, much less that of the party initiating resort to the legal process. The law itself is responsible for the consequences of its operation, not the

---

incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." MCR 3.310(D)(1) explicitly indicates the discretionary nature of this relief by stating that the court "may" require such security. Such express provisions of relief to a party injured by an injunction, if anything, underscore the continued viability of the general rule in Michigan and the federal system, to wit, that relief is not generally available to a party so injured apart from these rules. That the posting of security is not required of municipal corporations that seek injunctions, MCR 3.310(D)(2), does not, in our judgment, alter this inference.

litigant who avails himself of that law.[5]

Moreover, a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. *Sure-Tan, Inc v NLRB,* 467 US 883, 896-897; 104 S Ct 2803; 81 L Ed 2d 732 (1984); *Moore v Fragatos,* 116 Mich App 179, 185, n 3; 321 NW2d 781 (1982). Allowing a damages remedy here would elevate defendants' undeniable First Amendment rights over those of plaintiffs, when both sides here have call on the protections and guarantees of the United States Constitution. We believe that it would chill the right of access to the courts to make a litigant who invokes judicial remedies, in other than a frivolous proceeding, liable for damages for judicial error. No litigant, given a judiciary free of corruption and bias, has control over judicial actions.

Defendants rely on *Malley v Briggs,* 475 US 335, 344 n 7; 106 S Ct 1092; 89 L Ed 2d 271 (1986), in support of their contention that plaintiffs are responsible for the constitutional harm here. The *Malley* Court addressed the degree of immunity accorded a police officer whose submission of a criminal complaint that was facially inadequate to establish the requisite probable cause resulted in the issuance of an arrest warrant. It stated:

---

[5] That there are additional transactional costs, in terms of delay, involved in an *appeal,* does not shift responsibility for the consequences of an erroneously granted injunction. Defendants' injury resulted from the fact that appellate correction of the circuit court's error was not instantaneous. However, the system does not generally compensate for such unavoidable delays of process.

> [Section] 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link. [*Id.* (citation omitted.)]

It held that the magistrate's action in authorizing the arrest warrant did not insulate the police officer from personal liability for a failure to exercise reasonable professional judgment in making the threshold determination whether the facts alleged could possibly justify an arrest. *Id.* at 345-346.

Defendants also cite a number of federal cases involving § 1983 causation issues.[6] All involve police officers who either provided misleading information or failed to provide relevant exculpatory information in pursuing criminal charges and who argued that they were not responsible for any constitutional deprivations because other parties, e.g., prosecutors, intervened. In *Jones v Chicago,* 856 F2d 985, 993-994 (CA 7, 1988), the court reiterated that "a man [is] responsible for the natural consequences of his actions"

---

[6] *Jones v City of Chicago,* 856 F2d 985 (CA 7, 1988), *Robinson v Maruffi,* 895 F2d 649 (CA 10, *1990), Buenrostro v Collazo,* 973 F2d 39 (CA 1, *1992), DeLoach v Beavers,* 922 F2d 618 (CA 10, *1990), Goodwin v Metts,* 885 F2d 157 (CA 4, 1989), *Wagenmann v Adams,* 829 F2d 196 (CA 1, 1987), *Reich v Minnicus,* 886 F Supp 674 (SD Ind, 1993), *Johnson v Chicago,* 711 F Supp 1465 (ND Ill, *1989), Mitchell v City of Hartford,* 674 F Supp 60 (D Conn, 1986).

(citations omitted) and that *Malley* held that the issuance of an arrest warrant will not shield a police officer from liability if a reasonably well-trained officer would have known that his affidavit failed to establish probable cause. It continued:

> By parallel reasoning, a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial -- none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision. . .
>
> If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded. [*Id.* at 994]

These cases involve factual misrepresentations by police officers to the parties responsible for deciding whether to proceed with criminal charges or whether there is sufficient evidence to issue arrest or search warrants. In this context, where a subsequent decision-maker makes a decision solely on the basis of information provided by a police officer, usually in an ex parte presentation, that decision cannot shield the officer who engaged in wrongdoing by supplying false or misleading information. The misleading information is so enmeshed in the decision of the subsequent decision-maker that the officer's misconduct merges with the action of the subsequent decision-maker. The essential point of these cases is that where the officers' misconduct taints the legal process,

a decision bearing that taint cannot insulate the officer from liability.

Defendants cite *Wyatt v Cole,* 504 US 158, 164 -165; 112 S Ct 1827; 118 L Ed 2d 504 (1992), for the proposition that § 1983 liability extends to parties who "set the wheels of government in motion by instigating a legal action." Actually the portion of *Wyatt* cited by defendants states only that the absolute immunity accorded public prosecutors and judges at common law "did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by a legal action." Id. Thus, the *Wyatt* Court did not address the issue of the plaintiff's affirmative liability under § 1983 for seeking relief under the statute but only addressed whether they were entitled to absolute immunity akin to that of selected public officials. *Id.* at 168-169.

Further, *Wyatt* involved a statute allowing seizure of property on the basis of *ex parte proceedings.* See also *Lugar v Edmonson Oil Co,* 457 US 922; 102 S Ct 2744; 73 L Ed 2d 482 (1982). In these cases, the courts made decisions to seize or execute on property on the basis of information provided solely by the party seeking such relief and subsequent hearings required by the statutes resulted in the dismissal of the complaints. That these courts changed their minds about the propriety of seizure or execution suggests that, only upon the subsequent full hearings were the courts provided with a complete recitation of the facts necessary to resolve the controversies. Accordingly, we believe that these cases also involved situations where the actions of the parties seeking relief may be understood to have merged with the judicial actions.

The rationale of these cases carve out an exception to the general rule that the court - or more properly the law itself - rather than the party seeking an injunction, is responsible for

a wrongly issued injunction. We note that the *Malley* Court itself expressly indicated that it was announcing an exception to the general rule that parties requesting relief are not responsible for errors by a court in issuing such relief

> [I]t goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i.e.*, his request is outside the range of the professional competence expected of an officer. [*Malley, supra* at 346 n 9.]

This exception applies when the party seeking an injunction engages in misconduct that taints the process such that the court's decision cannot be separated from the party's misconduct. For example, in *Dennis v Sparks,* 449 US 24, 25, 31-32; 101 S Ct 183; 66 L Ed 2d 185 (1980), the Court held that private parties who "participate in subverting the judicial process" by conspiring with a judge to "corruptly" issue an injunction were not immune from § 1983 damages liability. A merger of a party's actions with judicial action is also sometimes implicated when judicial decisions are made on the basis of ex parte proceedings. Ex parte proceedings allow a party to present a single version of the facts and applicable law without an opportunity for an opposing party to contest these representations. The possibility that concerned the *Malley* court with regard to arrest warrants --"it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should," *Malley,* at 345-346 is largely vitiated in an adversarial proceeding. The actions of a party do not merge with the court's actions when

the court is able to fulfill independently its adjudicative responsibilities and to exercise its discretion on the basis of information gleaned in an adversarial proceeding.

The proposition that a party is "responsible for the natural consequences of his actions" is limited where subsequent, independent factors are more proximately responsible for the consequences. In the cases cited by defendants, this proposition held because the officers' misconduct infected the subsequent decisions of prosecutors or judges and thereby remained a proximate cause of any constitutional violations. However, generally, in the absence of misconduct by a party that taints the process and the independence of subsequent decisionmakers, what emerges from the legal process is more directly a consequence of the dictates of the law than the conduct of a litigant.

Here, plaintiffs' pursuit of the injunction, which was ultimately determined to be overbroad, did not taint the legal process. Plaintiffs did not engage in any wrongdoing. Plaintiffs did not make misrepresentations that would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion. Plaintiffs simply made the colorable argument that their proposed injunction was warranted under the undisputed facts relating to the previous Klan rally. Plaintiffs' attorney, exercising "reasonable professional judgment," *Malley, at* 346, could have responsibly concluded that the request for preliminary injunctive relief was justified by the facts and the law. Further, the proceedings were not ex parte. They were conducted adversarially, as required by MCR 3.310(A)(1); both parties had a full opportunity to proffer evidence, to contest proofs advanced by the other and to argue their respective positions. The trial court was thus properly apprised of the facts and the arguments of both sides and was

able to make an informed judgment concerning the merits of the proposed injunction. The exercise of this independent judgment by the court, untainted by any misconduct on plaintiffs' part, constitutes the "cause" of the constitutional violation at issue.

For these reasons, we conclude that defendants cannot raise a genuine factual issue indicating that plaintiffs were responsible for the constitutional violation at issue. Accordingly, the trial court properly granted plaintiffs' motion for summary disposition regarding the §1983 claim, albeit on the basis of a different analysis than that articulated here. Therefore, we will not disturb the circuit court's holding on appeal. See *In re Condemnation of Private Property to Acquire Land for the Detroit Metropolitan Wayne Co Airport,* 211 Mich App 688, 692; 536 NW2d 598 (1995).

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

DAVID C. HOLLISTER, et al.,
Plaintiffs/Counter-Defendants.

File No. 94-77936-AZ
Hon. Lawrence M. Glazer

v.

KNIGHTS OF THE KU KLUX KLAN,
et al.,
Defendants/Counter-Plaintiffs.

OPINION AND ORDER

Section 1983 Claim

The Klan argues that the City's seeking of an injunction constituted an unconstitutional prior restraint upon free speech.

It is important that certain distinctions be plainly stated. The City's petition to this Court did not request an order that would be unconstitutional under any and all (or even under most) circumstances, unlike the "Pentagon Papers" case, in which the U.S. government sought a flat

prohibition on any publication of certain classified documents. Instead, the City sought a restriction as to the place and time of a planned speech and demonstration. Such a restriction is not *per se* unlawful, as many cases have held, most prominently *Christian Knights of the KKK* v *District of Columbia*, 973 F2d 365 (1992).

This Court is aware of no case which deals with the issue as to whether petitioning a court to restrict the time, place or manner of a proposed demonstration constitutes unlawful prior restraint.

The Klan argues that *Malley v. Briggs*, 106 S. Ct. 1092 (1986) is such a holding.

In *Malley*, the petitioner, a state policeman, had sought and obtained an arrest warrant for respondent based on logs of court-approved wiretaps. After the arrest, the grand jury did not return an indictment and the criminal case was dropped, whereupon Respondent filed a Sec. 1983 action against petitioner.

At trial the Court granted directed verdict for petitioner on the ground that submission of the arrest warrant to a magistrate broke the causal chain between petitioner's filing of a complaint and respondent's arrest, and petitioner was therefore entitled to immunity.

The First Circuit Court of Appeals reversed, holding that an officer is not entitled to immunity unless there is an objectively reasonable basis for believing that the facts stated in his/her affidavit are sufficient to establish probable cause.

The Supreme Court affirmed, holding that there is no absolute immunity for executive branch officials under Sec.

1983, but only qualified immunity where, objectively, officers of reasonable competence could disagree on whether a warrant should issue. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable... will the shield of immunity be lost. (At 1098).

Malley did hold that an officer of the executive branch who seeks to restrict the liberty of a citizen, by arresting the citizen, does not acquire unqualified immunity by petitioning a court to authorize the arrest.

In the present case, the issue is not immunity, but whether the Klan has a cause of action. Nevertheless, even applying the standard announced in Malley, in order to find liability this Court would have to conclude that City officials of reasonable competence could not disagree that the City of Lansing had no basis in fact or law to seek the injunction which was sought in this case.

On this record the Court cannot make such a finding. As this Court stated:

"Captain Rapp testified, and his testimony was undisputed, that there were intelligence reports, and posters posted throughout the City which threatened escalated violence, and possibly deadly violence, by organized groups should the Klan rally."

"Lt. Cook testified, and his testimony was undisputed, that the City was just barely able to avert a riot . . . at the end of the April rally . . . and this was with a field force of 500 officers . . . He further testified that the City cannot muster a field force of anywhere near that size this coming Saturday. No testimony was elicited that would call

this into question, no testimony was elicited that this was some phony budgetary excuse. . . ."

"Furthermore, the City has provided an alternative site which its officials believe can be adequately policed, and the testimony is undisputed that any speakers sponsored by the Klan at that site would be able to communicate their message to each other as well as to members of the public." (Transcript of July 19, 1994 hearing)

Thus the facts of record supported the City's petition.

Moreover, there was no disagreement between the parties that the D.C. Circuit Court of Appeals decision in *Christian Knights* stated the applicable law; both parties cited that case to this Court, which then applied that decision to the undisputed facts of record.

In *Christian Knights* the D.C. Circuit Court of Appeals affirmed the trial Court's findings of fact that the authorities did have the ability to police the proposed march, but expressly declined to rule that ". . . the First Amendment forbids authorities, under any circumstances, to place any preconditions on public demonstrations because of the prospect of violent reaction. We cannot agree that a threat of violence is an impermissible ground even for a time, place and manner limitation. When the choice is between an abbreviated march and a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers and others in the vicinity." (At 374)

The Court of Appeals 'one-paragraph order of peremptory reversal did not overrule the above-summarized findings of fact, nor did it disagree that *Christian Knights*

permits reasonable restrictions on time, place and manner when the prospect of reactive violence is real. As this Court understands the Order, the Court of Appeals merely ruled that this Court erred in holding that the State Capitol grounds held no symbolic significance for this demonstration and in ordering an overly broad remedy of moving the demonstration to another location.

The significance of this is that if this Court had effectuated a narrower injunctive remedy, leaving the demonstration at the Capitol, the appellate result might have been different.

In other words, as this Court understands it, the Court of Appeals did not hold that the City had no cause of action, just that the remedy sought (and granted) was too broad. The scope of an injunction may be (and should be) tailored by the Court to achieve the desired end as narrowly as possible. In this it is unlike an arrest warrant, which a magistrate can only approve or disapprove.

The law does not make the City liable in damages simply because it sought too broad an injunction.

Thus, the City's motion for summary disposition on the Sec. 1983 claim must be granted.

Malicious Prosecution

Defendant's counterclaim for malicious prosecution is a straightforward tort claim and is not part of its Sec. 1983 claim. Thus it is resolved under Michigan law.

According to *Friedman v. Dozorc*, 412 Mich 1 (1981), the elements of malicious prosecution are: (1) Prior

proceedings terminated in favor of the instant plaintiff, (2) absence of probable cause for those proceedings, (3)'malice', i.e., a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and, (4) in a claim arising from a civil action, special injury.

This Court agrees with counter-Plaintiff that the prior proceedings have terminated in favor of counter-Plaintiff, in that the Court of Appeals reversed this Court's grant of the injunction and Plaintiffs have not appealed that order.

However, this Court cannot find that Plaintiffs' suit lacked probable cause. As detailed above in analyzing the Sec. 1983 claim, this Court was persuaded that both the facts and the law supported Plaintiffs' claim. It is self-evident that 'lack of probable cause' requires something more than mere termination of the suit in favor of counter-Plaintiffs.

In *Fort Wayne Mtg. v. Carletos*, 95 Mich App 752 (1980), the Court of Appeals held that lack of probable cause is established (in the context of a criminal prosecution) where a defendant "failed to make a full and fair disclosure of all material facts, if he gave false information, or if he interfered with the official's discretion" (at 758)

In the present case there is no evidence that Plaintiffs concealed material facts in their petition or their testimony, or gave false facts. It is worth restating that the Court of Appeals reversed on a point of law, and the facts found by this Court must be presumed to be sound.

Therefore, the Counter-Defendants' motion for summary disposition on malicious prosecution is granted for failure to plead facts constituting the element of no probable cause.

Finally, the Court declines to award sanctions against Plaintiffs for failure to voluntarily dismiss its claim after that claim was mooted by time. This is not a case in which Plaintiff"s counsel failed to make inquiry of its client, resulting in a non-viable suit continuing; the facts were equally known to counsel for both sides. In the negotiations between the parties after this Court's hearing, it is clear that there was much to discuss besides the Plaintiff's claim; there was Defendants' counter-claim and the prospect of further demonstrations. Defendants, knowing the facts as well as Plaintiffs, could take the mootness into account in these negotiations.

/s/
Lawrence M. Glazer, Circuit Judge

Dated: June 20, 1995

APPENDIX D

ORDER

Mayor of Lansing v
Knights of the Ku Klux Klan, et al.

Martin M. Doctoroff
Presiding Judge

Docket # 177118

Kathleen Jansen
Clifford W. Taylor
Judges

L.C. # 94-77936 AZ

The Court orders that the motion for immediate consideration is **GRANTED**.

The Court orders that the motion for peremptory reversal pursuant to MCR 7.211(C)(4) is GRANTED. Based upon the facts presented to this Court in the briefs of the parties and in the complaint and affidavits of plaintiff, the circuit's court's July 21, 1994 preliminary injunction represents an abuse of discretion. The facts of this case do not justify enjoining defendant"s exercise of its First Amendment rights in a quintessentially public forum, and we find that the preliminary injunction was not narrowly drawn to achieve a compelling state interest. *Madsen v Women's Health Center, Inc, 512* US 573; 114 S Ct 2516; 129 L Ed 2d

593 (1994); *Forsyth County v The Nationalist Movement*, 505 US 123; 112 S Ct 2395; 120 L Ed 2d 101 (1992); *Frisby v Schultz*, 487 US 474; 108 S Ct 2495; 101 L Ed 2d 420 (1988); *Boos v Barry*, 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988); *Perry Education Ass'n v Perry Local Education Assn*, 460 US 3 7; 103 S Ct 948; 74 L Ed 2d 794 *(1983); Christian Knights of the Ku Klux Klan v District of Columbia*, 297 US App DC 312; 972 F2d 365 (1992). Insulting and even outrageous speech must be tolerated in order to protect First Amendment freedoms. *Boos v Barry, supra, 485* US at 322. The grounds of the State Capitol are both symbolic and directly relevant to defendant's intended message. The threat of violence relied upon by plaintiff is insufficient to prohibit entirely defendant's speech in the public forum chosen by defendant.

This interlocutory matter is **REMANDED** for further proceedings. Jurisdiction is not retained.

Date: Aug 02, 1994

/s/
Chief Clerk

No. 97-1604

In The

Supreme Court of the United States

October Term, 1997

KNIGHTS OF THE KU KLUX KLAN and DAVID A. NEUMANN,

Petitioners,

vs.

DAVID C. HOLLISTER, MAYOR OF LANSING and CITY OF LANSING,

Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

JAMES D. SMIERTKA
City Attorney
BRIAN V. BEVEZ*
Assistant City Attorney
Attorneys for Respondents
5th Floor, City Hall
Lansing, Michigan 48933
(517) 483-4320

* *Counsel of Record*

146148

(800) 274-3321 • (800) 359-6859

A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

COUNTER-QUESTION PRESENTED FOR REVIEW

Did the Michigan trial court, court of appeals and supreme court properly find that Respondents' simple request for injunctive relief based upon First Amendment time, place, and manner constraints did not cause a deprivation of Petitioners' First Amendment rights under 42 U.S.C. § 1983?

The Michigan trial court said:	Yes.
The Michigan Court of Appeals said:	Yes.
The Michigan Supreme Court said:	Yes.
Respondents say:	Yes.
Petitioners say:	No.

TABLE OF CONTENTS

	Page
Counter-Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Counter-Statement of the Case	1
Reasons for Denying the Writ	8
I. The Michigan Courts Were Entirely Correct In Finding That Respondents' Lawsuit Seeking Injunctive Relief Based Upon First Amendment Time, Place, And Manner Constraints Did Not Cause A Deprivation Of Constitutional Rights Under 42 U.S.C. § 1983.	8
Conclusion	18

Contents

Page

TABLE OF CITATIONS

Cases Cited

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 17

Christian Knights of KKK v. District of Columbia, 972 F.2d 365 (D.C. Cir. 1992) 12

Clark v. Community for Creative Non Violence, 468 U.S. 288 (1984) 12

Collins v. Harker Heights, 503 U.S. 115 (1992) 12

Madsen v. Women's Health Center, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) 12

RAV v. St. Paul, 505 U.S. 377 (1992) 12

Sanders v. St. Louis County, 724 F.2d 665 (8th Cir. 1983) 17

Thomas v. Collins, 323 U.S. 516 (1945) 17

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 88 S. Ct. 353 (1967) 17

Ward v. ROCH Against Racism, 492 U.S. 781 (1989) 12

Contents

Page

Statutes Cited:

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 2

United States Constitution Cited:

First Amendment ..... i, 6, 12, 13, 16, 17, 18

OPINIONS BELOW

The December 30, 1997 Order of the Michigan Supreme Court denying Petitioners' request for leave to appeal is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 456 Mich. 915; 573 N.W. 2d 616 (1997). That order is reproduced in Petitioners' Appendix beginning at page 1a.

The April 4, 1997 opinion of the Michigan Court of Appeals is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan (After Remand)*, 222 Mich. App. 637; 564 N.W. 2d 177 (1997). That opinion is reproduced in Petitioners' Appendix beginning at page 3a.

The June 20, 1995 opinion of the Ingham County Circuit Court is not officially reported. That opinion is reproduced in Petitioners' Appendix beginning at page 19a.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals' decision was issued on April 4, 1997. Petitioners filed an Application for Leave to Appeal in the Michigan Supreme Court seeking discretionary review. That application was denied in an Order dated December 30, 1997 (Petitioners' App. 1a). This Court's jurisdiction is being invoked by Petitioners under 28 U.S.C. § 1257(a).

COUNTER-STATEMENT OF THE CASE

On June 6, 1994, the Knights of the Ku Klux Klan (KKK) applied for permission to conduct a rally on the grounds of Michigan's State Capitol on July 23, 1994. The KKK filed a request with the Michigan Capitol Committee; the committee created by Michigan law which is charged, to a limited extent,

with the responsibility of overseeing the capitol grounds. The request was approved by the Executive Director of the Michigan Capitol Committee in early June. Approval of this request followed a previous rally held by the KKK on April 23, 1994 on capitol grounds at which time the police department of the City of Lansing and other police agencies were present in a peacekeeping capacity.

On July 8, 1994, the City of Lansing and David Hollister, the mayor of the City of Lansing, filed a cause of action in the Ingham County Circuit Court against the KKK, Mr. Neumann, and others. In their Complaint, the City of Lansing and Mr. Hollister ("Respondents") sought an injunction "prohibiting and restraining the Defendants, their employees, agents, members and those in active concert with them from conducting, or allowing to be conducted, a Klan rally . . . on the State Capitol Grounds on July 23, 1994." The Complaint also requested that the rally be held at an alternate site, namely, Benjamin Davis Park located in the City of Lansing.

On July 18, 1994, the KKK and Mr. Neumann ("Petitioners") filed their Answer to the Complaint. Petitioners also filed a counterclaim in which they asserted that Respondents, by initiating and prosecuting their injunction action, were "seeking to restrain the exercise of [Petitioners'] state and federal constitutional rights to free speech, association, assembly and petition." The Petitioners' counterclaim contained a request for declaratory relief and damages under both the Michigan Constitution and the federal civil rights act, 42 U.S.C. §§ 1983 and 1988.

A hearing on the Respondents' Motion for Preliminary Injunction was held in the Ingham County Circuit Court on July 19, 1994. At that hearing, Respondents presented three witnesses, Mr. Hollister and two members of the City's police

force. These three witnesses testified concerning an earlier KKK rally at the state capitol conducted in April, 1994 and the rally scheduled to be held on July 23, 1994. Mr. Hollister is Respondents' mayor and also chief executive officer and chief law enforcement officer of the City of Lansing pursuant to municipal charter. The two members of the police force testifying were Rick Cook and James Rapp. Cook is a lieutenant and a twenty year veteran of Respondents' police force. He was qualified during the course of the hearing as an expert in the areas of police field force disposition and civil disorder. Rapp is a captain and a twenty-five year veteran of Respondents' police force. He was qualified during the course of the hearing as an expert in the field of intelligence and crowd control. The testimony of these three witnesses was consistent relative to the April 23 rally — the crowd was out of control; police security was breached; and there came a point in time that the police force had basically no control of the crowd. During that rally counter-demonstrators attempted to disrupt the KKK's activities. These witnesses also testified that they feared that there might be similar violence directed against the KKK by counter-demonstrators at the rally planned for July 23, 1994. On the basis of this fear of violence from counter-demonstrators, Respondents requested an injunction prohibiting Petitioners from conducting their rally at the state capitol. In addition, they requested that the location of the rally be changed to a nearby city park.

At the end of the July 19, 1994 hearing, the circuit judge orally announced that he would grant the request for a preliminary injunction:

> THE COURT: I've had occasion previously in this courtroom to refer to the case of *Clark versus Community for Creative Non-violence*, a 1984 decision of the U.S. Supreme Court. In that case,

the court ruled that reasonable restrictions as to the place, time, and manner of expression are constitutionally sufficient if justified without reference to the content of the speech to be expressed, and if narrowly tailored to serve a legitimate government interest, and to leave open ample alternative channels for communication.

Both sides have cited the case of *Christian Knights of the Ku Klux Klan versus District of Columbia*, a 1992 decision found at 972 F.2d 365, a decision of the District of Columbia circuit, and I find, indeed, the case is applicable, and its ruling is applicable, in this case given the peculiar facts of this case.

* * *

As I said, in that case no one disputed that a violent response was likely. The only issue was the ability of the police to control that violence . . .

So this morning, and this afternoon, this Court heard testimony on the question as to whether the police would have a reasonable chance of controlling violence at the state capitol if the rally were allowed to proceed at that location.

Captain Rapp testified, and his testimony was undisputed, that there were intelligence reports, and posters posted throughout the city which threatened escalated violence, and possibly deadly violence, by organized groups should the Klan rally.

Lieutenant Cook testified, and his testimony was undisputed, that the city was just barely able to avert

> a riot during the April rally — I should say at the end of the April rally — when the members of the Klan went into the capitol building, and this was with a field force of 500 officers, including 200 Lansing Police Department officers.
>
> He further testified that the city cannot muster a field force of anywhere near that size this coming Saturday. No testimony was elicited that would call this into question, no testimony was elicited that this was some phony budgetary excuse. Captain Rapp's testimony makes clear that there are grounds for expecting even worse attempts at violence by organized groups. All this evidence is undisputed.
>
> Furthermore, the city has provided an alternative site which its officials believe can be adequately policed, and the testimony is undisputed that any speakers sponsored by the Klan at that site would be able to communicate their message to each other as well as to members of the public. All of this evidence is undisputed.
>
> I believe that the city has met the standards stated by the Court of Appeals in *Christian Knights*, and unlike the trial judge in that case, the testimony in this case compels me to conclude that the city cannot adequately police or prevent crowd violence with the personnel available at the state capitol this coming Saturday. Therefore, I will grant the injunction prayed for by the city.

(July 19, 1994 TR of trial court opinion, pp. 2-6.)

Thereafter, Petitioners challenged the circuit court's injunctive decree in the Michigan Court of Appeals having filed

an emergency appeal in that court. On August 2, 1994, a panel of that Court issued an Order reversing the trial court's preliminary injunction. (Petitioners' App. 26a.) The Michigan Court of Appeals held that the circuit court's injunction infringed on Petitioners' exercise of their First Amendment rights in a quintessentially public forum and remanded the case to the circuit court for further proceedings.

Following remand to the circuit court, Petitioners filed a motion for partial summary disposition on the issues raised in their counterclaim. In that motion, Petitioners asserted that, because the Court of Appeals had ruled in its August 2, 1994 decision that the injunction obtained by Respondents had violated Petitioners' First Amendment rights, they were entitled to judgment with respect to the liability aspects of their § 1983 claim.

Respondents filed a response to the Petitioners' motion for partial summary disposition. In addition, Respondents filed their own motion for summary disposition, requesting that all of the claims stated in the Petitioners' counterclaim be dismissed.

Following briefing and oral argument on the motions, the circuit court issued a written Opinion and Order on June 20, 1995, granting Respondents' motion for summary disposition. (Petitioners' App. 19a.-25a.) In this regard, the circuit court said:

> The [Respondents'] petition to this Court did not request an order that would be unconstitutional . . . Instead, [Respondents] sought a restriction as to the place and time of a planned speech and demonstration. Such a restriction is not *per se* unlawful, as many cases have held, most prominently *Christian Knights of the KKK v. District of Columbia*, 973 F.2d 365 (1992).

(Petitioners' App., 19a.-20a.)

Petitioners then appealed the circuit court's decision dismissing their § 1983 and state constitutional claims to the Michigan Court of Appeals. Petitioners argued that the trial court's decision granting judgment as a matter of law to Respondents was in conflict with the Michigan Court of Appeals' August 2, 1994 Order which found that the injunction violated Petitioners' rights under the United States Constitution. During oral argument in the Michigan Court of Appeals, one of the three judges assigned to the case raised the question, presented here, of whether Respondents' conduct could be considered a proximate cause of Petitioners' injury or whether the source of that injury was solely the circuit court's issuance of an injunction.

On April 4, 1997, the Michigan Court of Appeals issued its decision in this case. *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 222 Mich. App. 637; 564 N.W. 2d 177 (1997). In that opinion, the court initially recognized that:

> The United States Supreme Court has recognized the validity under the First Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. *See*, *Madsen*, *supra*.

(Petitioners' App. 9a.) The Michigan Court of Appeals for this reason, and others, also held that Petitioners' causation argument was without merit. Based upon well-settled law, the Court of Appeals held that:

> . . . the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for purposes of § 1983 because any erroneous issuance of an injunction is the act of the *court*.

(Petitioners' App. 11a.) Moreover, the Court held that "the processes of *law* can be said to have caused any constitutional

violation resulting from an injunction." (Petitioners' App. 11a.) Importantly, it also held that "to transform judicial error into a basis of tort liability by an adversely affected litigant would chill legitimate access to courts." (Petitioners' App. 12a.) Finally, it recognized that "[t]he exercise of this independent judgment by the court, untainted by any misconduct on [Respondents'] part, constitutes the 'cause' of the constitutional violation at issue." (Petitioners' App. 18a.)

Taking exception with the Michigan Court of Appeals' decision, Petitioners sought leave to appeal the dismissal of their § 1983 claims in the Michigan Supreme Court. On January 30, 1997 the Michigan Supreme Court issued an Order denying Petitioners' application. (Petitioners' App. 1a.)

REASONS FOR DENYING THE WRIT

I.

THE MICHIGAN COURTS WERE ENTIRELY CORRECT IN FINDING THAT RESPONDENTS' LAWSUIT SEEKING INJUNCTIVE RELIEF BASED UPON FIRST AMENDMENT TIME, PLACE, AND MANNER CONSTRAINTS DID NOT CAUSE A DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER 42 U.S.C. § 1983.

The singular argument presented here is one of causation and in simple terms is stated by Petitioners as follows:

> By seeking and successfully obtaining an injunction Respondent *caused* Petitioner to be subjected to a violation of First Amendment rights . . . sufficient for liability under § 1983. (Emphasis added.)

(Petition, p. 11.) Throughout the proceedings of this lawsuit, this argument has been routinely rejected by each judicial forum but, nevertheless, it has been continually reasserted by Petitioners on appeal.

Initially, Petitioners maintained that their counterclaim filed with the trial court was based upon a denial of their constitutional rights protected by § 1983. In this regard, they argued that:

> By seeking a circuit court injunction and succeeding on that claim, the [Respondents] *caused* the [Petitioners] to be subjected to a violation of First Amendment rights. (Emphasis added.)

(Application for Leave to Michigan Supreme Court, p. 17.) Carrying this argument further, Petitioners insisted that:

> . . . [Respondents] simply could not sustain a claim that the circuit court's decision granting an injunction constitutes a superceding *cause* of [Petitioners'] injury, thereby severing the causal relationship. (Emphasis added.)

(Application for Leave to Michigan Supreme Court, p. 22.) In support of this argument, Petitioners presented to the Michigan Supreme Court the same case law it presented to the Michigan Court of Appeals and, in this regard, suggested that the Court of Appeals "chose not to address [this issue]." (Application for Leave to Michigan Supreme Court, p. 17.) This suggestion is clearly disingenuous. The Court of Appeals did address this issue in detail and with much discussion.

In this regard, the Court initially addressed the issue of causation which applies to Respondents as a municipality under § 1983:

> Proper analysis of a § 1983 claim against a municipality requires examination of two issues: "(1) whether plaintiff's harm was *caused* by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. Harker Heights*, 503 U.S. 115, 120; 112 S. Ct. 1061; 117 L. Ed. 2d 261 (1992). (Emphasis added.)

(Petitioners' App. 7a.) Having stated the applicable federal standard, the Court then observed:

> [Petitioners] also cite a number of federal cases involving § 1983 causation issues. All involve police officers who either provided misleading information or failed to provide relevant exculpatory information in pursuing criminal charges and argued that they were not responsible for any constitutional deprivations because other parties, *e.g.*, prosecutors, intervened.
>
> * * *
>
> These cases involve factual misrepresentations by police officers to the parties responsible for deciding whether to proceed with criminal charges or whether there is sufficient evidence to issue arrest or search warrants.
>
> * * *
>
> The essential point of these cases is that where the officers' misconduct *taints* the legal process, decisions bearing that *taint* cannot insulate the officer from liability. (Emphasis added.)

(Petitioners' App. 13a-15a.) In conclusion, the Court held:

> Here, [Respondents'] pursuit of the injunction, which was ultimately determined to be over broad, did not *taint* the legal process. [Respondents] did not engage in any wrongdoing. [Respondents] did not make misrepresentations that would have undermined the trial court's ability to perform its adjudicative function or to exercise its discretion. [Respondents] simply made the colorable argument that their proposed injunction was warranted under the undisputed facts relating to the previous Klan rally. [Respondents'] attorney, exercising "reasonable professional judgment," *Malley*, at 346, could have responsibly concluded that the request for preliminary injunctive relief was justified by the facts and the law. Further, the proceedings were not ex parte. They were conducted adversarially, as required by MCR 3.310(A)(1); both parties had a full opportunity to proffer evidence, to contest proofs advanced by the other and to argue their respective positions. (Emphasis added.)

(Petitioners' App. 17a.)

In short, the Court of Appeals correctly held that Petitioners' causation claim under § 1983 was clearly misplaced given the absence of any supporting law. Moreover, given the undisputed facts elicited before the trial court in an adversarial hearing, there were no misrepresentations which could even begin to "taint" the legal process. Instead, Respondents' actions in seeking injunctive relief:

> . . . consisted exclusively of availing [itself] of the legal process to try to limit the location of [Petitioners'] rally. The United States Supreme Court has recognized the validity under the First

> Amendment of injunctions placing narrowly-tailored time, place and manner restrictions on speech. *See, Madsen v. Women's Health Center*, 512 U.S. 753; 114 S. Ct. 2516; 129 L. Ed. 2d 593 (1994). Here, [Respondents], having some reason to anticipate violence, attempted to strike at its preemptively by pursuing an injunction to limit the place of the planned rally to a more easily defended location. [Respondents] presented a colorable claim that their proposed injunction constituted an appropriate time, place, or manner restriction on [Petitioners'] First Amendment rights and sought a court ruling on the issue.

(Petitioners' App. 8a-9a.)

By availing itself of this legal process under *Madsen*, *supra* and its progeny[1] Respondents sought merely to exercise its own First Amendment rights. By no means did it cause or deprive these same First Amendment rights guaranteed to others. This much is fundamentally clear as was recognized by the Michigan Court of Appeals. Citing *Collins v. Harker Heights*, 503 U.S. 115, 120 (1992) the Court of Appeals stated the pertinent applicable causation standard which is relevant here:

> . . . whether plaintiff's harm was caused by a constitutional violation . . .

Id., p. 120. Given the present factual and legal context presented, the Court of Appeals concluded that Respondents' filing of an action merely seeking injunctive relief was not a

---

1. *See also RAV v. St. Paul*, 505 U.S. 377 (1992); *Ward v. ROCH Against Racism*, 492 U.S. 781 (1989); *Clark v. Community for Creative Non Violence*, 468 U.S. 288 (1984); *Christian Knights of KKK v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992).

deprivation of any purported constitutional deprivation under § 1983:

> Moreover, a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant *would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 896-897; 104 S. Ct. 2803; 81 L. Ed. 2d 732 (1984); *Moore v. Fragatos*, 116 Mich. App. 179, 185, n 3; 321 N.W.2d 781 (1982). Allowing a damages remedy here would elevate [Petitioners'] undeniable First Amendment rights over those of [Respondents], when both sides here have call on the protections and guarantees of the Constitution. We believe that it would chill the right of access to the courts to make a litigant who invokes judicial remedies, in other than a frivolous proceeding, liable for damages for judicial error. No litigant, given a judicial free of corruption and bias, has control over judicial actions. (Emphasis added.)

(Petitioners' App. 12a.)

Simply stated, the Michigan Court of Appeals was correct. Respondents under the First Amendment and well-recognized time, place and manner constraints had the absolute right to seek access to the courts. Nonetheless, Petitioners insist that this right was the causative factor which led to a purported violation of their First Amendment rights. This begs the question — if one legally accesses a court in an adversarial hearing under the First Amendment, can he or she be punished under the same amendment for doing so? Unequivocally, the answer is no. Under the facts and law presented here, Petitioners' causation argument is clearly misplaced.

Nonetheless, Petitioners are persistent in this regard. Citing Restatement (Second) of Torts and other authority, they maintain that:

> Under these basic common law principles, the Michigan Court of Appeals' determination that the actions of Respondents were not a proximate cause of Petitioners' constitutional injuries cannot be sustained.

(Petition, p. 15.) Presumably in support of this argument, Petitioners insist that:

> . . . Respondents cannot sustain a claim that the [trial court's] decision granting an injunction constitutes *the* cause or a superseding cause of the Respondents' injuries, thereby severing the causal relationship. (Emphasis supplied by Petitioners.)

(Petition, pp. 14-15.) Again, this causation argument is flawed for at least two reasons.

First, the Michigan Court of Appeals recognized that both under federal and state law the issuance of an injunction is an act "caused" by the court, erroneous or otherwise, and not an act "caused" by the party seeking the injunction. In this regard, the Court of Appeals aptly summarized the context of Petitioners' causation argument:

> The direct "cause" of the constitutional violation here was the court's issuance of the overbroad injunction, not [Respondents'] pursuit thereof. If the court had denied the injunction, there would have been no constitutional violation. However, [Petitioners] argue that [Respondents] "caused" the constitutional

> violation because the court would not have issued the overbroad injunction unless [Respondents] had requested it. In other words, "but for" [Respondents'] lawsuit, the court would not have been prompted into taking its action.

(Petitioners' App. 10a.) Despite this "but for" argument, the Court of Appeals correctly held that:

> Under federal law, the general rule is that if an injunction issues erroneously, any resulting irreparable injury is not redressable because the error was an act of the court, not of the party who sought the injunction. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union*, 471 F.2d 872, 876 (CA 6, 1972). Similarly, in Michigan, at common law the general rule is that there is no tort liability for wrongfully suing out an injunction. *In re Pritchard Estate*, 169 Mich. App. 140, 149; 425 N.W.2d 744 (1988).

(Petitioners' App. 10a.) In short, the trial court's issuance of an erroneous injunction is the "cause" of any alleged injury arising therefrom. It is not a litigant's pursuit thereof.

In a broader sense, it is the operation of law itself that is the purported "causative" factor of any alleged wrongdoing.

> More generally, the processes of the *law*, can be said to have caused any constitutional violation resulting from an injunction. Here, the circuit court sought to interpret § 1983, the First Amendment, and the law concerning injunctions. The circuit court did nothing more than give voice to this law. That, in view of this Court, it ultimately erred in its interpretation

> does not alter the fact that it was the operation of the *law* itself that caused any resulting harm to defendants. Our legal system fully contemplates that courts will sometimes act in error and that such error will need to be corrected through an appellate process. Const. 1963, art. 6, § § 1, 8 and 13. That such appellate process must be invoked before an error can be corrected does not mitigate the fact that it is the law itself that is working its effected upon the parties, not the will of the individual judge, much less that of the party initiating resort to the legal process. The law itself is responsible for the consequences of its operation, not the litigant who avails himself of the law.

(Petitioners' App. 11a.-12a.)

Moreover, Petitioners' argument is flawed because the mere filing of a complaint seeking injunctive relief, if found actionable, would chill any litigants right of access to a court of competent jurisdiction which serves to redress First Amendment violations, or constraints, as Respondent did here. This was clearly recognized by the Michigan Court of Appeals.

> . . . a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-897; 104 S. Ct. 2803; 81 L.Ed.2d 732 (1984) . . .

(Petitioners' App. 12a.) The right of access to the courts is not a novel concept.

This Court has held that "the right of access to the courts is indeed but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right to petition is "among the most precious of the liberties safeguarded by the Bill or Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). This right has a "sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As an aspect of the First Amendment right to petition, the right of access to the courts shares this "preferred place" in our hierarchy of constitutional freedoms and values. To this legal end, federal courts have consistently held that the constitutional right of access to the courts "cannot be impaired, either directly . . . or indirectly, by threatening or harassing [anyone] in retaliation for filing lawsuits". *Sanders v. St. Louis County*, 724 F.2d 665, 666 (8th Cir. 1983).

Given this body of law, it is clear that Respondents' "right of access to the courts" to seek injunctive relief based upon well-settled First Amendment time, place and manner constraints is undeniable. However, if this Court were to accept Petitioners' argument that the mere filing of a lawsuit seeking such injunctive relief was actionable, Respondents' First Amendment "right of access to the courts" would not only be chilled, but effectively denied. In other words, neither Respondent nor any other litigant under the same circumstances would request relief from an independent factfinder, despite well-established law and the unrefutable evidence it can present. The reason is clear — if you lose the case despite the best intentions of policymakers based upon colorable law, you will, as a matter of law, pay exorbitant costs, disbursements, and attorney fees for merely asserting your First Amendment rights on behalf of those persons you are duty-bound to protect. This was clearly not the intent underlying the federal constitution; the Michigan constitution; nor, was it the intent underlying the enactment of 42 U.S.C. § 1983.

CONCLUSION

Based upon the foregoing discussion, the instant Petition should be summarily dismissed. The causation issue presented here is without merit, and if applied, would render ineffective well-established First Amendment time, place, and manner constraints. Also, it would render firmly established law attendant to injunctive relief previously decided by this Court equally ineffective. In addition, Petitioners failed to discuss any official policy or custom demonstrating a causal responsibility for a constitutional deprivation. This failure is fatal to Petitioners' claim for relief. Finally, the issues raised here are neither imperative to public importance nor do these issues involve legal principles of major significance to this nation's jurisprudence. Dismissal of this Petitioner is in order.

Respectfully submitted,

JAMES D. SMIERTKA
City Attorney
BRIAN W. BEVEZ*
Assistant City Attorney
Attorneys for Respondents
5th Floor, City Hall
Lansing, Michigan 48933
(517) 483-4320

* *Counsel of Record*